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Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

2007 Term

CHARLOTTE DENNETT
Petitioner

v.

CENTRAL INTELLIGENCE AGENCY,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Charlotte Dennett, *pro se*
3538 Upper Valley Road
Cambridge, VT 05444
(802) 644-598

Question Presented for Review

1. Whether a United States Court of Appeals may render a judgment on an important federal question in a way that conflicts with a relevant decision of this Court?

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The Opinion of the United States Court of Appeals, Second Circuit denying Appellant's Petition for Rehearing is unreported

The Opinion of the United States Court of Appeals, Second, Circuit affirming the United States District Court's decision (below) is unreported.

The Opinion of the United States District Court dated November 2, 2006 denying Plaintiff's Request for an Extension of Time in Which to An Appeal is unreported.

All three opinions are to be found in the Appendix of this petition.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeal for the Second Circuit was rendered October 27, 2007 and a Petition for Rehearing by that court was denied without opinion on December 20, 2007.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1) and the Rules of the U.S. Supreme Court, Rule 10 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 3(a)(1) of Federal Rules of Appellate Procedure: "An appeal permitted by law as of right from a district court to a court of appeals must be taken only by filing a notice of appeal with the district court."

Rule 4 (a)(1)(B) of Fed. R. App. P. "When The United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered."

Rule 4 (a)(5)(A) of Fed. R App. P: " The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) and

(ii) regardless of whether its motion is filed before or during the 30 days after the time

prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

STATEMENT OF THE CASE

1. The concept of *stare decisis* -- respect for the authority of precedent -- is fundamental to American jurisprudence, especially when a decision by the U.S. Supreme Court is involved.

As enunciated in *Rodriguez de Quijas v Shearson/Am. Expr. Inc.* 490 US 477, 484 (1989) "the circuit courts are not free to ignore Supreme Court precedents."

In this case, the U.S. Court of Appeals for the Second Circuit ignored the core finding of *Pioneer Investment Services Co. v. Brunswick Associates Ltd.* 507 U.S. 380 (1993), namely: that when determining "excusable neglect" on the part of an attorney, a court must take into consideration *"all relevant circumstances"* surrounding an attorney's late filing.

2. The bare-boned facts of this case are this: On Saturday, September 23, 2006, petitioner sent a notice of appeal regarding her FOIA action against the CIA to the wrong P.O. Box in Burlington, Vermont. The document, due Monday September 25th, was returned as not-deliverable. By then, her deadline for filing had passed.

Based largely on these selective facts, the U.S.

Court of Appeals affirmed the lower court's decision that petitioner failed to show excusable neglect.

3. Neither court took into consideration the "relevant circumstances" spelled out in petitioner's rebuttal document (document no. 35, dated October 27, 2006) explaining *why* petitioner erred as she did.

Document No. 35 explains that petitioner a) called the District Court to inquire about filing fees b) was referred to a clerk at the District Court (Ms. Grenia) who specifically handled Notices of Appeal for the Appellate Court c) mistakenly believed that Ms. Grenia was therefore the "'resident clerk' handling appeals for the U.S. Court of Appeals in the District Court office" d) addressed the Notice of Appeal to Ms Grenia, believing Ms. Grenia had her own office in the U.S. District Court e) consulted a1999 bar directory (since the Court was closed on Saturday) to determine where, specifically, to send the notice of appeal f) found two Burlington PO Boxes listed, and opted to err on the side of specificity by sending the Notice of Appeal to the Burlington P.O. Box for the Court of Appeals, instead of the Burlington P.O. Box for the U.S. District Court. (Both P.O. Boxes were located in the same federal building that houses the U.S. District Court.)

The U.S. Court of Appeals chose to ignore these relevant circumstances in its decision, even though petitioner specifically asked the panel to examine Document No. 35.

4. During this whole process, petitioner did not misread the plain language of federal rules

regarding when to file the notice of appeal or where to file it. She correctly consulted the District Court. The appeals "clerk" there (actually, the "coordinator") had not told her the exact address for sending a notice of appeal. So petitioner mailed her notice to this "appeals clerk" – within the time allowed by federal rules – using a P.O. Box in the District Court/Federal Building designated for the Court of Appeals. This is how she made her inadvertent mistake

5. One of the judges, during the oral arguments, asked appellee CIA whether petitioner's mistake was not, in fact, a "small mistake." Reporters for the *New York Times* and *Village Voice* who were in the courtroom covering other cases picked up on this and ended up writing stories about this case that concluded that the CIA was trying to get it dismissed on a minor technicality. They apparently saw petitioner's error for what it was: an inadvertent mistake.

6. The three-judge panel rejected petitioner's claim that her mistake was inadvertent and rejected her argument that the lower court had abused its discretion by failing to consider all relevant circumstances. Instead, it provided a cursory summary order which amounted to a narrow recitation of the lower court's opinion.

REASONS FOR ALLOWING THE WRIT

1. Had the U.S. Court of Appeals abided by the standards laid out in *Pioneer,* it would have engaged in an "equitable inquiry" into all the circumstances behind petitioner's mistake. Had it

done so, it would have concluded that petitioner's errors were indeed the result of inadvertence, i.e. an "unintentional lack of care" and thereby excusable.[1]

2. The Second Circuit's adoption of a "hard line" with regard to an attorney's error, as adopted in the instant case and admitted to in *Silivanch v Celebrity Cruises*, 333 F.3d 355 (2nd Cir. 2003) is inconsistent with the "liberal standard of review" arrived at by the U.S. Supreme Court in *Pioneer*. The *Pioneer* court was clearly trying to adhere to neutral legal principles as it studied different interpretations of "excusable neglect" in bankruptcy rules, federal rules of civil and appellate procedure, and case law. It tried to avoid the personal whims of individual judges, including the need to "save judicial resources." It took sharp exception to the arguments presented by the dissenting justices, warning that their hard line would, if allowed, erect "a rigid barrier" against late failings "attributable *in any degree* to the movant's negligence." [Emphasis added] *Id.* at fn, 396.

3. In fact, the "hard line" adopted by the Second Circuit in *Silivanch* is not only in direct contravention to the "elastic" and liberal standard

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[1] Both the lower court and the Second Circuit cite a sentence in *Pioneer* ("Inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable neglect") when the *Pioneer* court is in fact simply reviewing one standard (which appears in F.R.C.P. Rule 6b) before reaching its own separate conclusion, which is that an attorney's "inadvertent failure to file...within the deadline...can constitute 'excusable neglect.'"
In other words, the *Pioneer* court accepts "inadvertence" while the Second Circuit and the lower court try to reject it, citing the FRCP Rule 6(b) above.

set by *Pioneer*, but is now becoming –just as the *Pioneer* court warned -- a standard which is almost impossible to meet. In *In Re Johns-Mansville Corp,* 476 F.3d 118 (2d Cir. 2007), for example, the court (building on *Silivanch*) comes up with a new hurdle: "absent extraordinary circumstances, attorney inadvertence is not excusable neglect." (Emphasis added)

4. The Second Circuit is building a hurdle so high, petitioner stated in oral arguments, that it seems as though an attorney must prove the death of a family member before being able to convince this Court of excusable neglect.

CONCLUSION

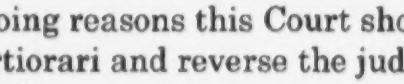
To sum up, the petitioner prays that this Court will reinstate its authority in *Pioneer*, reject the rigid barriers now being erected by the Second Circuit, and apply both the letter and the spirit of *Pioneer* to the case at hand – by examining *all* of the *relevant* circumstances behind petitioner's inadvertent mistake.

Petitioner also prays that this Court revisit the first of *Pioneer's* " relevant circumstances," namely, "the danger of prejudice" to the non-moving party, and weigh the conduct of the non-moving party in the course of litigation. In the instant case, defendant-appellee CIA stonewalled petitioner's requests for her deceased father's papers *for years*, in direct contravention of U.S.C. 552 (a) (6)(A)(2) requiring a response to Freedom of Information requests within 20 days. Context is frequently addressed in *Pioneer*, and it seems a great travesty

of justice that petitioner should be denied a fair and equitable inquiry into her case, as required by *Pioneer,* when the respondent repeatedly violated the law.

For the foregoing reasons this Court should allow the writ of certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,



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United States Court of Appeals for the Second Circuit

Docket No. 05-cv-47

Charlotte Dennett,
Appellant

v.

Central Intelligence Agency
Appellee

A petition for panel rehearing having been filed herein
by Appellant Charlotte Dennett,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is

DENIED. [Dated December 20, 2007]

Hon. Robert A Katzmann, Hon. Debra Ann Livingston, Circuit Judges, Hon. Edward R. Korman, District Judge

For the Court:
Catherine O'Hagan Wolfe, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Charlotte Dennett Appellant	)	Summary Order
	)	Filed October 26, 2008
Central Intelligence Agency Appellee	)	

Appeal from the U.S. District Court District of Vermont, J. Garvan Murtha, U.S District Judge

Present: HON. ROBERT A. KATZMANN,
HON. DEBRA ANN LIVINGSTON
Circuit Judges
HON. EDWARD R. KORMAN
District Judge

Charlotte Dennett, appearing for the plaintiff-appellant *pro se*

Michael P. Drescher, Assistant United States Attorney, appearing for the defendant-appellee

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED and DECREED that the order of the district court is AFFIRMED. [Dated October 26, 2007]

Appellant Charlotte Dennett, pro se, appeals from a November 2, 2006 order of the United States District Court for the District of Vermont (Murtha, J.) Denying her motion for an extension of time to file a notice of appeal under Fed. R. App. P. 4(a)(5). We presume the parties' familiarity with the facts and procedural history of the case, and the arguments on appeal.

This Court reviews the district court's denial of a motion for an extension of time under Fed. R. App. P. 4(a)(5) for abuse of discretion. *Goode v Winkler*, 252 F3d 242, 245 (2d Cir. 2001)(per curiam) If a notice of appeal is filed beyond the 60-day period, upon a party's motion under Fed. R. App. P. 4(a)(5), "[the] district court may, on a showing of good cause or excusable neglect," extend the period to file a notice of appeal "for up to 30 days from the original deadline or until 10 days after the date of entry of the order granting the motion, whichever is later." *Mendes Junior Int'l Co. v Banco do Brasil,* 215 F.3d 306, 312 (2d Circ. 2000).

Here, the district court properly found that although appellant timely moved for an extension of time to file a notice of appeal, her excuse for the late filing – that she mailed the notice of appeal to the wrong address – did not constitute excusable neglect. See *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'tshp.*, 507 U.S. 380, 392 (1993) ("inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect"); (The excusable neglect standard can never be met by

a showing of inability or refusal to read and comprehend the plain language of the federal rules." (quoting *In re Cosmopolitan Aviation Corp,* 763 F.2d 507,515 (2d Cir. 1985) (internal citations omitted); *Canfield v. Van Atta Buick/GMC Truck, Inc,* 127 F3d 248 251 (2d Cir. 1997) (per curiam) ("failure to follow the clear dictates of a court will generally not constitute" excusable neglect); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton,* 16 F.3d. 501, 5103 (2d Circ. 1994). As the district court noted, appellant waited until the last possible day to mail her notice of appeal and ascertained the address for the court from an out-of-date directory. Further, the undisputed evidence demonstrates that appellant received proper instructions from the district court about how to file her notice of appeal and, although these instructions did not include the district court's address, appellant had previously filed numerous documents in that court. Thus, there is no indication that the district court abused its discretion in determining that appellant's actions did not constitute excusable neglect and denying her motion for an extension.

Accordingly, the order of the district court is AFFIRMED.

FOR THE COURT,

_____

Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CHARLOTTE DENNETT	)	
	)	
v.	)	Civil No. 1:05CV47
	)	
CENTRAL INTELLIGENCE AGENCY	)	

RULING ON MOTION FOR EXTENSION OF TIME TO APPEAL
(Paper 32)

On July 27, 2006, the Court granted the Central Intelligence Agency's (hereinafter "CIA") Motion for Summary Judgment in plaintiff's Freedom of Information Act case, and the Clerk entered judgment. Because the CIA is an agency of the United States, the Plaintiff was required to file her notice of appeal on or before September 25, 2006. See Fed. R. App. P 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered."). It is undisputed that the plaintiff did not properly file her notice of appeal on or before September 25, 2006.

On October 3, 2006, the plaintiff filed this Motion for Extension of Time to file her notice of

appeal. See generally Fed. R. App. P. 4 (outlining procedures for filing an "Appeal as of Right").

In relevant part, rule 4(a)(5) of the Federal Rules of Appellate Procedure provides:

> (A) The district court may extend the time to file a notice of appeal if:
>
> (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
>
> (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

The plaintiff has filed her Motion for Extension within "30 days after the time prescribed," as required by Fed. R. App. 2. 4(a)(5)(i). Nevertheless, the Government objects to the plaintiff's motion on the ground that she has shown neither "excusable neglect" nor "good cause' for allowing the time to file her notice of appeal to expire. See Def.'s Opp. (Paper 34) at 1.

According to the Advisory Committee Notes to the 2002 Amendments to Rule 4, "[the] excusable

neglect standard applies in situations in which there is fault..." whereas "[t]he good cause standard applies in situations...usually occasioned by something that is not within the control of the movant."

The plaintiff explains her failure to timely file her notice of appeal as follows.

Although she understood from speaking with this Court's Appeals Coordinator that her notice of appeal "was to be sent to the District Court," she "did not inquire what address to use." Pl's Mot. (Paper 32-1) at para. 1. Instead, she consulted the Vermont Bar Association's 1999 Directory and somehow ascertained the correct mailing address was the "U.S. Curt of Appeals" at PO Box 392, Burlington, VT" the address of the late Hon. Fred Parker. See Paper 32-1, para. 2 and Paper 33. Although Ms. Dennett is proceeding *pro se*, apparently she is an attorney licensed to practice in Vermont. See Papers 32-2 and 33 (appended to her Motion for Extension of Time). Because the plaintiff waited until Saturday, September 23, 2006, to mail her notice, the documents were returned to her as "not deliverable," a fact she did not confirm until her husband retried their mail, on or about September 29, 2006. See Paper 32-1 at paras. 3, 7 and Paper 32-2.

Because these facts suggest the plaintiff missed the deadline for filing her notice of appeal as a result of her own faulty actions, and not because of circumstances outside her own control, the Court will apply the "Excusable neglect" standard.

"It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" *Griggs v. Provident Consumer Disc. Co,* 459 U.S. 56, 61 (1982) (citation omitted). The Second Circuit also has stated: "Compliance with Rule 4(a) is 'mandatory and jurisdictional.'" *Silivanch v. Celebrity Cruises,* Inc. 333 F.3d 353, 363 (2d Cir. 2003) (citation omitted). Accordingly, although a court may have some flexibility when considering excuses for the failure to timely file a notice of appeal, "inadvertence, ignorance of the rules, or mistakes construing the rules do no usually constitute 'excusable' neglect..." *Pioneer Inv. Servs. Co. v Brunswick Assoc. Ltd. P'ship,* 507 U.S. 380, 392 (1993).

In *Silivanch,* the Court further explained:

> In our cases addressing when neglect is "excusable," we have therefore taken a hard line...The mere possibility that a court may properly find excusable neglect [where it consists of inadvertence, ignorance of the rules, or mistakes construing the rules] does not alter the principle that failure to follow the clear dictates of a court rule will generally not constitute excusable neglect.
>
> 333 F.3d. at 368 (citation and quotation marks omitted).

Here, the plaintiff waited until virtually the last minute to file her notice of appeal and then used the wrong address obtained from a seven-year-old

directory. What is more basic than ascertaining the correct address to file a document as important and time-sensitive as a notice of appeal? Such inadvertence or ignorance of a basic rule does not constitute excusable neglect. See *Canfield v. Van Atta Buick/GMC Truck, Inc,* 127 F.3d 248, 250 (2d Cir. 1997) ("Nor, given the mandatory nature of the time limitations, may a party be estopped to assert that the deadline for appeal has not been met.") *Weinstock v. Clearly, Gottlieb, Steen & Hamilton,* 16 F. 3d 501,503 (2d Cir. 1994) (rejecting the argument that a litigant's failure to comply with Rule 4(a) "was simply the product of a good-faith misunderstanding of the Rules").

Of these facts, the Court cannot find the plaintiff's failure to timely file her notice of appeal was the result of excusable neglect. The Motion for Extension of Time (Paper 32) within which to file her notice of appeal is DENIED.

SO ORDERED

Dated at Brattleboro, Vermont this 2nd day of November, 2006.

J. Garvan Murtha
United States District Court